

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JUDITH COLE, a single person; LOUISE  
MICHAEL, a single person; DAVID  
JOHNSON, a single person,

Plaintiffs,

v.

KEYSTONE RV COMPANY, a foreign  
business entity,

Defendant.

NO. 3:18-cv-05182-RBL

**PLAINTIFFS' SECOND MOTION  
TO COMPEL DISCOVERY AND  
AWARD FEES PURSUANT  
TO FRCP 37**

**NOTE ON MOTION CALENDAR:  
FRIDAY, MARCH 1, 2019**

**JURY TRIAL**

**I. INTRODUCTION**

This motion is filed on the heels of the plaintiffs' first motion to compel discovery against Keystone, filed one week ago today.<sup>1</sup> The plaintiffs' first motion to compel concerned pervasive deficiencies in Keystone's responses to the plaintiffs' first set of interrogatories, etc., and their first requests for admission directed to Keystone. Keystone objected to **12 out of 14** interrogatories; **41 out of 42** requests for production; and **23**

<sup>1</sup> Plaintiffs incorporate their first motion to compel discovery by reference herein.

1 **out of 23** requests for admission. In all, Keystone objected to **76 out of 79** discovery  
2 requests. Much of the discovery sought was objective information in Keystone's  
3 possession, such as the names of company employees, specific complaints made by  
4 consumers, specific lawsuits filed against the company, and similar kinds of information  
5 readily available to Keystone. The information and documents which Keystone did provide  
6 in this discovery, was almost always non-responsive.  
7

8 The instant motion concerns (again) pervasive deficiencies in Keystone's responses  
9 to the plaintiffs' second through fifth set of interrogatories, etc. In response to the  
10 plaintiffs' second set of interrogatories, etc., Keystone objected to **3 out of 3**  
11 interrogatories and **25 out of 25** requests for production. In response to the plaintiffs'  
12 third set of requests for production (no interrogatories), Keystone objected to **20 out of**  
13 **20** requests. In response to the plaintiffs' fourth set of requests for production (no  
14 interrogatories), Keystone objected to **33 out of 33** requests. In response to the  
15 plaintiffs' fifth set of requests for production (no interrogatories), Keystone objected to  
16 **18 out of 19** requests. In all, Keystone objected to **99 out of 100** discovery requests  
17 which are the subject of this motion.  
18

19 Both of the plaintiffs' first and the second motions to compel discovery are  
20 remarkably similar in the dense, repetitive, and boiler-plate nature of Keystone's multiple  
21 objections, while lacking in any substantive responses. And just like the first motion to  
22 compel, much of the discovery requested by the plaintiffs which is the subject of the  
23 instant motion, seeks objective information in the possession of Keystone. The limited  
24  
25

1 information and documents which Keystone has provided in discovery is almost always  
2 non-responsive.

3 For example, one of the key issues in the case involves Keystone's "caution" to  
4 consumers regarding the "prolonged occupancy" of its RVs, which Keystone publishes in  
5 its Owners Manual.<sup>2</sup> The actual "caution" was reproduced from the Manual in the  
6 plaintiffs' amended complaint at par. **3.14**. *Dkt. 5, pg. 9*. The same phrase ("prolonged  
7 occupancy"), in whole or part, is also referenced in numerous other parts of the amended  
8 complaint. For example, *see* **pars. 1.3, 1.5-1.8, 1.10-1.11, 2.5, 3.1, 3.3, 3.7, 3.9,**  
9 **3.17, 3.19-3.20, 3.25, 3.28 and 9.1.**

11 The plaintiffs have repeatedly sought in discovery to determine what Keystone  
12 means by its own term, "prolonged occupancy," and the health hazards that it says could  
13 result from "prolonged occupancy." In the plaintiffs' *second* set of interrogatories and  
14 requests, the plaintiffs sought this information in **RFP 20 and 24**; in the third set, the  
15 plaintiffs sought this information in **RFPs 1, 9-11, and 19-20**; in the fourth set, the  
16 plaintiffs sought this information in **RFP 24, 29 and 31**; and in the fifth set, the plaintiffs  
17 sought this information in **RFP 4**. *In all twelve of these requests, Keystone provided no*  
18 *substantive information or documents about what the company means by the term*  
19 *"prolonged occupancy."*  
20  
21

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22  
23 <sup>2</sup> The plaintiffs' complaint alleges that disclaimers, such as Keystone's "caution" to consumers, must be  
24 disclosed to consumers before the purchase of the product, and not buried on a 98-page Owners Manual,  
25 which most consumers never read cover-to-cover.

The plaintiff has sought similar information about Keystone's own language in its Owners Manuals, including "health hazards" the company asserts will result from the "prolonged occupancy" of its RVs. This is referred to in the Manual in this way:

*. . . Prolonged Occupancy (sic) can lead to premature component failure and create conditions, which if not managed properly, may be hazardous to your health and/or cause significant damage to your recreational vehicle. . . .*

Keystone has not provided any meaningful information or documents in response to the plaintiffs' discovery, which may explain what Keystone means by this caution, or the facts which gave rise to Keystone's decision to publish this "caution" in its Owners Manual.

*See* Dkt. 5, pg. 9.

## II. FACTS RELEVANT TO MOTION

### A. The Exhibits Attached Hereto

This motion concerns the plaintiffs' second set of interrogatories and requests for production which were served on Keystone on October 25, 2018 (Exhibit 1 hereto); plaintiffs' third set of requests for production which were served on Keystone on November 30, 2018 (Exhibit 2 hereto); plaintiffs' forth set of requests for production which were served on Keystone on December 4, 2018 (Exhibit 3 hereto); plaintiffs' fifth set of requests for production which were served on Keystone on December 10, 2018 (Exhibit 4 hereto); and plaintiffs' second set of requests for admissions which were served on Keystone on December 10, 2018 (Exhibit 5 hereto).

## B. Plaintiffs' Efforts to Conduct a Discovery Conference

The plaintiffs initiated a second discovery conference with Keystone's counsel, scheduled for February 12, 2019, in advance of the instant motion. Keystone's counsel unilaterally aborted the conference the evening before, on a claim that the plaintiffs did not provide a writing to the defense describing the areas that would be discussed. Despite the plaintiffs' numerous attempts to persuade Keystone to proceed with the conference, Keystone's counsel refused to participate in the February 12 conference, or a re-scheduled discovery conference. Worse, Keystone and its counsel refused to provide *any* date or time when it *would* participate in a discovery conference.

Below is a timeline of communications regarding the February 12 discovery conference, supported by contemporaneous emails:

- January 22, 2019 – Plaintiffs' counsel sent an email requesting a discovery conference. (Ex. 6).
- January 22, 2019 – Plaintiffs' counsel sent an eight (8) page letter to Keystone's counsel requesting dates of availability for discovery conference. (Ex. 7).
- January 23, 2019 – Plaintiffs' counsel sent a two (2) page letter to Keystone's counsel regarding Keystone's inadequate responses to Plaintiffs' Second Requests for Admission. Plaintiffs' counsel requested that Keystone amend their responses to RFA's 21, 29 and 30 within seven (7) days or participate in a discovery conference. (Ex. 8).
- January 25, 2019 – Plaintiffs' counsel sent an email to Keystone's counsel requesting a discovery conference to resolve some of the discovery disputes without involving the court. (Ex. 9).
- January 31, 2019 – Plaintiffs' counsel sent an email again asking for the availability of Keystone's counsel for a discovery conference. (Ex. 10).

- 1 • February 5, 2019 – Plaintiffs’ counsel sent an email suggesting February 12,  
2 2019 at 1:00 pm for a discovery conference with Keystone’s counsel. (Ex.  
3 11).
- 4 • February 6, 2019 – Plaintiffs’ counsel sent an email to Keystone’s counsel  
5 and provided a dial-in number for the discovery conference call. (Ex. 12).
- 6 • February 11, 2019 – Plaintiffs’ counsel sent an email to Keystone’s counsel  
7 confirming a discovery conference scheduled for February 12, 2019. Later  
8 that day (6:13 p.m.), Keystone’s counsel emailed Plaintiffs’ counsel  
9 informing them that they would *not* be participating in the discovery  
10 conference the following day. (Ex. 13).
- 11 • February 12, 2019 - Keystone’s counsel sent an email to Plaintiffs’ counsel  
12 stating that they would not be participating in the discovery conference.  
13 (Ex. 14).
- 14 • February 12, 2019 – 12:31 p.m. – Plaintiffs’ counsel sent an email to  
15 Keystone’s counsel expressing disappointment over Keystone’s counsel  
16 unilaterally aborting the discovery conference. (Ex. 15).
- 17 • February 12, 2019 – 3:12 p.m. – Plaintiffs’ counsel sent an email to  
18 Keystone’s counsel requesting a discovery conference within the following  
19 forty-eight (48) hours. (Ex. 16).
- 20 • February 13, 2019 – Plaintiffs’ counsel sent an email to Keystone’s counsel  
21 again requesting authority supporting their claim that the Plaintiffs must  
22 provide an outline ahead of a discovery conference. Plaintiffs’ counsel also  
23 notified Keystone’s counsel that a discovery conference call was going to  
24 begin on February 14, 2019 at 9:00 am. (Ex. 17).
- 25 • February 13, 2019 – 4:06 p.m. –Keystone’s counsel sent an email to  
Plaintiffs’ counsel stating that they were “unavailable” for a discovery  
conference on February 14, 2019 at 9:00 a.m. (Ex. 18).
- February 14, 2019 – Plaintiffs’ counsel sent an email to Keystone’s counsel  
informing them that it was in bad faith to unilaterally abort a discovery  
conference without providing an alternate date and time. (Ex. 19).

### III. LAW AND ARGUMENT

Courts have consistently found that the practice of simultaneously objecting to a request for production, and then partially answering it “without waiving the objection” to be “an incomplete and non-responsive answer” and thereby a waiver of the objection. *See, Swackhammer v. Sprint Corp.*, 225 FDR 658, 660 (D. Kansas, 2004); *Gammon v. Clark*, 38 Wn. App. 274 (1984); *Traxler v. For Motor Co.*, 576 NW 2d 398, 401-3 (Mich.App.,1998); and *Meese v. Easton Mfg. Co.*, 35 FDR 162, 166 (ND Ohio, 1964).

In *Gammon*, a wrongful death case, the court also made note of the fact the defendant had objected to production of historical accident reports but still produced a small number notwithstanding the objection. At trial it was learned there were actually many more accident reports. This was not discernable from the original answers which contained objections. In this case as well, Defendants have repeatedly answered certain questions while also willfully withholding information. A party cannot have it both ways. Furthermore, it causes too many collateral problems that inevitably rear their head later, at trial.

Boilerplate objections give neither the court nor the other party anything with which to work. *See, Johnson v. Mermis*, 91 Wn. App. 127 (1998). In *Mermis*, the Court found that responses to interrogatories that included answers such as “overly broad” and “privileged” did not satisfy specificity requirements. *Mermis*, at 134. In this case, multiple objections contain the boilerplate “overly broad” objection with no explanation as to why defense counsel finds the question overbroad. Likewise, multiple “privilege” objections

1 contain no explanation. Defendants have clearly violated the dictate outlined by our  
2 Supreme Court in Mermis.

3 Washington's civil rules, like the federal rules of civil procedure, dictate that parties  
4 comply in good faith with interrogatories and requests for production, and the other  
5 discovery rules. The seminal case in Washington of Physicians Insurance Exchange v.  
6 Fisons Corporation, 122 Wn.2d 299 (1993) should have put a stop to incomplete and  
7 evasive answers to discovery requests. Apparently it has not.

8  
9 ...Rule 26(g) imposes an affirmative duty to engage in pretrial  
10 discovery in a responsible manner that is consistent with the spirit  
11 and purposes of Rules 26-37.

12 Fisons at 342 citing from *Amendments to the Federal Rules of Civil Procedure*  
13 advisory committee note, 97 F.R.D. 166, 216-19 (1983).

14 "The responses [to interrogatories] must be consistent with the letter, spirit, and  
15 purpose of the rules." Fisons at 344. "[The legal system] obviously cannot succeed  
16 without the full cooperation of the parties." Fisons 122 Wn.2d at 342. At p. 341 of the  
17 Fisons opinion the Court cited to the aforementioned *Federal Advisory Committee* note  
18 found at 97 F.R.D. 216-219 (1983), which cited the U.S. Supreme Court case of Hickman  
19 v. Taylor, 329 U.S. 495 (1947): "Mutual knowledge of all the relevant facts gathered by  
20 both parties is essential to proper litigation." Liberal discovery rules "make a trial less a  
21 game of blind-man's bluff and more a fair contest." Procter and Gamble Co., 356 U.S.  
22 677 682, 2 L.Ed.2d 1077, 78 S.Ct. 983 (1958).  
23  
24  
25



1       **A. Objections – Specificity Required**

2           Although parties sometimes avoid answering interrogatories fully and completely  
3 by stating objections, each and every objection has a particular body of case law  
4 associated with it. In general:

5                   Objections must be stated with specificity and supported by a  
6 detailed explanation as to why the interrogatory (or a class of  
7 interrogatories) is objectionable. *See, e.g., United States v.*  
8 *58.16 Acres of Land*, 66 F.R.D. 570 (E.D.Ill. 1975). If only part  
9 of an interrogatory is objectionable, the responding party must  
answer the interrogatory to the extent that it is not objectionable.

10       3A Karl B. Tegland, Washington Practice: Rules Practice §4, 721 (5<sup>th</sup> Edition 2006).

11       **B. Burdensome/Oppressive Objection**

12           “Burdensome and Oppressive” requires a showing that the requested  
13 information asks for undue effort or expense. Like any objection, it should be specific as  
14 to why there is a belief of burdensomeness or oppressiveness. Tegland states:

15                   (b) Burdensome and oppressive.

16                   The responding party may object if producing the  
17 requested information would involve undue effort or expense.  
18 In making a decision regarding undue burden, the court will  
19 balance the burden on the responding party to ascertain  
20 the information against the benefit to the propounding party  
21 of having the information. City of Seattle v. McConahy, 86  
22 Wn. App. 557, 937 P.2d 1133 (1997); Pulsecard, Inc. v.  
23 Discover Card Services, Inc., 168 F.R.D. 295 (D.Kan. 1996);  
24 Spector Freight Systems, Inc. v. Home Indemnity Co.,  
58 F.R.D. 162 (N.D.Ill. 1973) (tremendous expenditure of time  
and money which would be necessary for party to specifically  
answer over 10,000 separate questions contained in  
interrogatories outweighed any benefit of  
compelling answers).”

25       3A Karl B. Tegland, Washington Practice: Rules Practice §4, 721, 722 (5<sup>th</sup> Edition 2006).

1  
2 Keystone has offered no such showing and its objection to this effect must  
3 therefore be disregarded.

4 **C. Assertion of Attorney-Client Privilege & "Privacy Laws"**

5 Keystone asserted blanket attorney-client objections to certain discovery, once  
6 again with no accompanying explanations. The attorney-client privilege exception is very  
7 narrow. The party asserting it carries the burden. See Dietz v. Doe, 131 Wn.2d 835,  
8 844 (1997). How can a court determine if a claim of attorney-client privilege is valid?  
9 The Federal Rules provide guidance. Federal Rule of Civil Procedure 26(b)(5)(A)(ii) states  
10 that when such privilege is claimed, the party claiming privilege must "describe the nature  
11 of the documents, communications, or tangible things not produced or disclosed—and do  
12 so in a manner that . . . will enable other parties to assess the claim." FRCP  
13 26(b)(5)(A)(ii).  
14

15 **D. A Party May Obtain Any Non Privileged Matter. . .**

16 FRCP 26(b)(1) provides:

17 "Unless otherwise limited by court order, . . . [p]arties may obtain  
18 discovery regarding any nonprivileged matter that is relevant to  
19 any party's claim or defense and proportional to the needs of the  
20 case, considering the importance of the issues at stake in the  
21 action, the amount in controversy, the parties' relative access to  
22 relevant information, the parties' resources, the importance of  
the discovery in resolving the issues, and whether the burden or  
expense of the proposed discovery outweighs its likely benefit."

23 Keystone's discovery responses do not conform to FRCP 26(b)(1). The plaintiffs  
24 do not seek privileged information; nor information which is burdensome to collect; nor  
25

any other discovery unreasonable or improper. Keystone has provided virtually *zero* discovery which was not already in the possession of the plaintiffs.

### **E. The Duty of Litigants to Cooperate in Discovery**

"[T]he hallmarks of discovery in federal court are, and should be, openness, transparency, and candor. Gamesmanship, ambush, surprise, and concealment have no place in federal practice." Ely v. Cabot Oil & Gas Corp., No. 3:09-CV-2284, 2016 WL 4169197, at \*2 (M.D. Pa. Feb. 17, 2016), *quoting* Styler v. Frito-Lay, Inc., No. 1:13-CV-833, 2015 WL 11243423, at \*5 (M.D. Pa. Mar. 18, 2015).

A repeated "failure to cooperate in discovery would result in dismissal and default." Computer Task Group, Inc. v. Brotby, 364 F.3d 1112, 1117 (9th Cir. 2004), *citing* Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1413 (1990). *See also*, Malone v. U.S. Postal Service, 833 F.2d 128, 132-133 (9th Cir. 1987), *cert. denied*, 488 U.S. 819 (1988); Vinton v. Adam Aircraft Indus., 232 F.R.D. 650 (D. Colo. 2005); Payne v. Exxon Corp., 121 F.3d 503, (9th Cir. 1997).

In this motion, we have clear evidence of the same, two primary discovery rule violations by Keystone, that the plaintiffs' alleged in their first motion to compel discovery: 1) its failure to cooperate in scheduling and discovery matters; and 2) its persistent failure to provide any meaningful discovery. Both have caused significant prejudice to plaintiffs and now require an order compelling discovery.

### **VI. ATTORNEYS' FEES AND COSTS**

The plaintiffs request their fees and costs in their motion , on the same authority which they cited in their first motion to compel discovery. Should the Court grant the

1 instant motion and award fees, the plaintiffs will submit a fee application after the Court  
2 files its ruling.

3  
4 **VII. CONCLUSION**

5 For all of the reasons recited herein, the plaintiffs respectfully request that the  
6 Court grant the plaintiffs' second motion to compel discovery and award fees.

7 DATED THIS 14<sup>th</sup> day of February, 2019.

8 **LAW OFFICES OF EUGENE N. BOLIN, JR., P.S.**

9 By: s/Eugene N. Bolin, Jr.

Eugene N. Bolin, Jr., WSBA #11450

10 Law Offices of Eugene N. Bolin, Jr., P.S.

11 144 Railroad Ave., Suite #308

Edmonds, WA 98020

12 Telephone: 425-582-8165

Fax: 888-527-2710

13 Email: [eugenebolin@gmail.com](mailto:eugenebolin@gmail.com)

14 **LAW OFFICES OF RICHARD F. DeJEAN**

15 By: s/Richard DeJean

16 Richard DeJean, WSBA #2548

PO Box 867

17 Sumner, WA 98390

Telephone: 253-863-0922

18 Email: [rdejean@dejeanlaw.comcastbiz.net](mailto:rdejean@dejeanlaw.comcastbiz.net)

19 **BERRY & BECKETT PLLP**

20 By: s/Guy W. Beckett

Guy W. Beckett, WSBA #14939

21 1708 Bellevue Avenue

Seattle, WA 98122

22 Telephone: 206-441-5444

23 Email: [gbeckett@beckettllaw.com](mailto:gbeckett@beckettllaw.com)

24 Attorneys for Plaintiffs

**SUBJOINED DECLARATION OF EUGENE N. BOLIN, JR.**

Eugene N. Bolin, Jr., declares that the following is true and accurate to the best of my knowledge, under penalty of the laws of perjury of the State of Washington:

1. I am an attorney licensed to practice law in Washington and I represent the plaintiffs in this action. I have personal knowledge of the facts and matters recited herein.

2. Attached hereto are true and accurate copies of the following documents:

EXHIBIT 1: Plaintiffs' second set of interrogatories and requests for production to Keystone with responses

EXHIBIT 2: Plaintiffs' third set of requests for production to Keystone with responses

EXHIBIT 3: Plaintiffs' fourth set of requests for production to Keystone with responses

EXHIBIT 4: Plaintiffs' fifth set of requests for production to Keystone with responses

EXHIBIT 5: Plaintiffs' second set of requests for admission to Keystone with responses

EXHIBIT 6: January 22, 2019 email from Plaintiffs' counsel requesting a discovery conference.

EXHIBIT 7: January 22, 2019 eight (8) page letter from Plaintiffs' counsel to Keystone's counsel requesting dates of availability for discovery conference.

EXHIBIT 8: January 23, 2019 -two (2) page letter to from Plaintiffs' counsel to Keystone's counsel regarding Keystone's inadequate responses to Plaintiffs' Second Requests for Admission. Plaintiffs' counsel requested that Keystone amend their responses to RFA's 21, 29 and 30 within seven (7) days or participate in a discovery conference.

- 1 EXHIBIT 9: January 25, 2019 email from Plaintiffs' counsel to Keystone's counsel  
2 requesting a discovery conference to resolve some of the differences  
3 without involving the court.
- 4 EXHIBIT 10: January 31, 2019 email from Plaintiffs' counsel to Keystone's counsel  
5 asking for the availability of Keystone's counsel for a discovery  
6 conference.
- 7 EXHIBIT 11: February 5, 2019 email from Plaintiffs' counsel to Keystone's counsel  
8 suggesting February 12, 2019 at 1:00 pm for a discovery conference  
9 with Keystone's counsel and Keystone's email confirming availability  
10 for conference.
- 11 EXHIBIT 12: February 6, 2019 email from Plaintiffs' counsel to Keystone's counsel  
12 providing a dial in number for the discovery conference.
- 13 EXHIBIT 13: February 11, 2019 email from Plaintiffs' counsel to Keystone's  
14 counsel confirming a discovery conference scheduled for February  
15 12, 2019. And February 11, 2019 (6:13 p.m.), email from Keystone's  
16 counsel to Plaintiffs' counsel informing them that they would not be  
17 participating in the discovery conference the following day.
- 18 EXHIBIT 14: February 12, 2019 email from Keystone's counsel to Plaintiffs'  
19 counsel stating that they would not be participating in the discovery  
20 conference.
- 21 EXHIBIT 15: February 12, 2019 – 12:31 p.m. – email from Plaintiffs' counsel to  
22 Keystone's counsel expressing disappointment over Keystone's  
23 counsel unilaterally aborting the discovery conference.
- 24 EXHIBIT 16: February 12, 2019 – 3:12 p.m. – email from Plaintiffs' counsel to  
25 Keystone's counsel requesting a discovery conference within the  
following forty-eight (48) hours.
- EXHIBIT 17: February 13, 2019 – 2:38 p.m. - email from Plaintiffs' counsel to  
Keystone's counsel requesting authority supporting their claim that  
the Plaintiffs must provide an outline ahead of a discovery  
conference. Plaintiffs' counsel also notified Keystone's counsel that  
a discovery conference call was going to begin on February 14, 2019  
at 9:00 a.m.

1 EXHIBIT 18: February 13, 2019 – 4:06 p.m. – email from Keystone’s counsel to  
2 Plaintiffs’ counsel stating that they were “unavailable” for a discovery  
conference on February 14, 2019 at 9:00 a.m.

3 EXHIBIT 19: February 14, 2019 email from Plaintiffs’ counsel to Keystone’s  
4 counsel informing them that it was in bad faith to unilaterally abort  
5 a discovery conference without providing an alternate date and time.

6 **Certification of Good-Faith Conference Pursuant to LCR 37(a).**

7 Plaintiffs’ counsel has made multiple attempts to engage Keystone’s counsel to  
8 participate in a discovery conference to reach resolution of the discovery disputes framed  
9 in the instant motion. (*See* discussion *infra*.) The attempts were conducted by plaintiffs’  
10 counsel in good faith from January 22 through today’s date, and memorialized in emails  
11 referenced above. Plaintiffs’ counsel cannot conduct a discovery conference if Keystone’s  
12 counsel refuses to participate. The plaintiffs respectfully assert that the Court consider  
13 Keystone’s bad faith, in connection with this Certification.  
14

15 RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of February, 2019.

16 **LAW OFFICES OF EUGENE N. BOLIN, JR., P.S.**

17 By: s/Eugene N. Bolin, Jr.

18 Eugene N. Bolin, Jr., WSBA #11450

19 Law Offices of Eugene N. Bolin, Jr., P.S.

20 144 Railroad Ave., Suite #308

21 Edmonds, WA 98020

22 Telephone: 425-582-8165

23 Fax: 888-527-2710

24 Email: [eugenebolin@gmail.com](mailto:eugenebolin@gmail.com)

25 Co-Counsel for Plaintiffs

**DECLARATION OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of February, 2019, I caused the foregoing document to be filed with the Clerk of the Court via the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following persons:

Joseph P. Corr, WSBA #36584  
Corr Downs PLLC  
100 W Harrison St., Ste. N440  
Seattle, WA 98119-4163  
Phone: 206-962-5042  
[jcorr@corrdowns.com](mailto:jcorr@corrdowns.com)

James C. Percy (*pro hac vice*)  
8555 United Plaza Blvd., 5<sup>th</sup> Floor  
Baton Rouge, LA 70809  
[jpercy@joneswalker.com](mailto:jpercy@joneswalker.com)  
Telephone: 225-248-2130

Ryan E. Johnson (*pro hac vice*)  
8555 United Plaza Blvd., 5<sup>th</sup> Floor  
Baton Rouge, LA 70809  
[rjohnson@joneswalker.com](mailto:rjohnson@joneswalker.com)  
Telephone: 225-248-2080

Attorneys for Defendant Keystone RV  
Company

I affirm under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct to the best of my knowledge.

DATED this 14<sup>th</sup> day of February, 2019, at Edmonds, WA.

**LAW OFFICES OF EUGENE N. BOLIN, JR., P.S.**  
s/Eugene N. Bolin, Jr. \_\_\_\_\_

Eugene N. Bolin, Jr., WSBA #11450  
Attorney for Plaintiffs  
144 Railroad Ave., Ste. 308  
Edmonds, WA 98020  
Email: [eugenebolin@gmail.com](mailto:eugenebolin@gmail.com)  
425-582-8165